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HONGKEW HOLDINGS (M) SDN BHD

v.

HYUNDAI HEAVY INDUSTRIES CO LTD

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COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ARIFIN JAKA JCA
[CIVIL APPEAL NO: W-02-862-1999]

C

24 JULY 2007

LAND LAW: *Charge - Order for sale - Appeal against - Whether chargee entitled to enforce charge - Whether chargor had shown cause to the contrary - National Land Code, ss. 242(1), 256*

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This was an appeal by the appellant/defendant against an order of sale made against it pursuant to s. 256 of the National Land Code ('Code'). The respondent/plaintiff (chargee) and the defendant (chargor) had entered into a turnkey agreement to build a cement factory on the defendant's land. The construction cost of USD126 million was payable in instalments by the defendant to the plaintiff and in consideration of the foregoing, the defendant executed a charge in the plaintiff's favour. The defendant failed to make one or more of the payments under the turnkey contract and the plaintiff, having served the statutory demand in Form 16D, then took out a summons seeking an order for sale which it subsequently obtained. The defendant contended that since there was no loan from the plaintiff to it, the charge was not enforceable and, accordingly, the defendant had shown cause to the contrary.

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Held (dismissing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

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(1) Section 242(1) of the Code recognises that a charge may be secured to repay a debt or a sum which is not a debt. In short, Parliament has made it possible for registered proprietors of land to create charges to secure payments such as those in the present case. There was accordingly no merit whatsoever in the point taken by the defendant. What the defendant's complaint really boiled down to was that the

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plaintiff had committed a breach of its obligations under the turnkey contract and was, therefore, not entitled to enforce the charge. This submission failed for it is settled law that an application for an order for sale was not an action on the covenant; it is the exercise of a statutory remedy. In *Low Lee Lian v. Ban Hin Lee Bank Bhd*, the Federal Court limited the categories which constitute cause to the contrary under s. 256 of the Code to those: (i) where the chargor is able to successfully impeach the chargee's title to the charge on any of the grounds provided in s. 340 of the Code; (ii) where there is a failure on the part of the chargee to meet the conditions precedent for the making of an application for an order for sale; and (iii) where to grant an order for sale would contravene some rule of law or equity. Since the instant defendant had plainly failed to bring the facts of its case within any of these categories, no cause to the contrary was established before the High Court. (paras 3, 4 & 5)

Bahasa Malaysia *translation of headnotes*

Ini adalah rayuan perayu/defendan terhadap satu perintah jualan yang dibuat terhadapnya di bawah s. 256 Kanun Tanah Negara ('Kanun'). Responden/plaintif ('pemegang gadaian') dan defendan ('penggadai') telah memeterai satu perjanjian turnkey untuk membina sebuah kilang simen di atas tanah defendan. Kos pembinaan sebanyak USD126 juta akan dibayar secara beransur-ansur oleh defendan kepada plaintif, dan sebagai balasannya defendan memeterai satu gadaian untuk manfaat plaintif. Defendan gagal membuat satu atau lebih dari satu pembayaran di bawah kontrak turnkey, dan berikutnya plaintif menyerahkan tuntutan statutori di dalam Borang 16D dan memohon serta memperoleh satu perintah jualan terhadap tanah. Defendan berhujah bahawa oleh kerana tidak terdapat sebarang pinjaman oleh plaintif kepadanya, maka gadaian tidak boleh dikuatkuasakan. Menurut defendan, suatu 'cause to the contrary' telah berjaya dibuktikan olehnya.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 242(1) Kanun mengakui bahawa suatu gadaian boleh menjadi jaminan bagi membayar suatu hutang atau suatu jumlah yang bukan merupakan suatu hutang. Pendek kata,

Parlimen telah memungkinkan seorang pemilik berdaftar tanah untuk melaksanakan gadaian bagi menjamin pembayaran seperti yang berlaku di sini. Oleh itu, tidak ada merit pada hujah defendan. Apa yang sebenarnya menjadi rungutan defendan adalah bahawa plaintif telah melakukan pelanggaran kontrak turnkey dan dengan itu tidak berhak untuk menguatkuasakan gadaian. Hujah ini semestinya gagal kerana sudah menjadi undang-undang mantap bahawa suatu permohonan untuk perintah jualan bukan merupakan tindakan atas kovenan; ia sebaliknya suatu pelaksanaan remedi statutori. Di dalam *Low Lee Lian v. Ban Hin Lee Bank Bhd*, Mahkamah Persekutuan telah menghadkan kategori-kategori yang menjadi 'cause to the contrary' di bawah s. 256 Kanun seperti berikut: (i) di mana penggadai berjaya mencabar hak pemegang gadaian atas mana-mana alasan seperti yang diperuntukkan di bawah s. 340 Kanun; (ii) di mana terdapat kegagalan oleh pemegang gadaian untuk memenuhi syarat-syarat duluan bagi memfail permohonan perintah jualan; dan (iii) di mana membenarkan perintah jualan adalah bertentangan dengan mana-mana undang-undang ataupun ekuiti. Oleh kerana defendan semasa gagal membawa fakta-fakta kesnya ke dalam salah satu kategori ini, maka 'cause to the contrary' telah tidak dibuktikan di hadapan Mahkamah Tinggi.

Case(s) referred to:

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***

Malaysian International Merchant Bankers Bhd v. Dhanoa Sdn Bhd [1988] 1 CLJ 8; [1988] 1 CLJ (Rep) 193 SC ***(foll)***

Wong Chee Hong v. Cathay Organization [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 SC ***(refd)***

Legislation referred to:

National Land Code, ss. 242(1), 256, 340

For the appellant - Leong Chuan Wah; M/s Tee Tan & Partners

For the respondent - Liau Y-Ky (Hasmaliza Othman with him); M/s Iza Ng Yeoh & Kit

[Appeal from High Court, Kuala Lumpur; Originating Summons No: S3-24-946-97]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] This appeal (by the defendant in the court below) is directed against an order for sale made against it pursuant to s. 256 of the National Land Code 1965 ("the Code"). The order was made on 22 February 1999. Notice of appeal was lodged on 2 November 1999. No grounds of judgment were ever written by the learned judge. As such this court was put to the trouble of trawling through the appeal record to appreciate the respective parties' cases in the court below. In this respect this court can do no better than to quote from the judgment of Salleh Abas LP in *Wong Chee Hong v. Cathay Organization* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298:

> We hope that judges should endeavour to write their grounds of decision and take delight in this aspect of judicial work as a matter of personal pride and satisfaction and not as a burdensome task. Failure on the part of judges to write their grounds of decision will certainly undermine their authority to insist upon magistrates and presidents of Sessions Courts to write theirs. If the practice of not writing grounds of judgment is widespread, the system of administration of justice will tumble down.

[2] The facts which form the background to this appeal are these. The plaintiff (chargee) and the defendant (chargor) entered into a turnkey agreement to build a cement factory on the defendant's subject land. There was a supplemental agreement but nothing turns on this. The construction cost of USD 126 million was payable by the defendant to the plaintiff. The sum was payable in instalments, the precise details of which are not relevant for present purposes. In consideration of the foregoing the defendant executed a charge in the plaintiff's favour. The defendant failed to make one or more of the payments under the turnkey contract. The plaintiff having served the statutory demand in Form 16 D then took out a summons seeking an order for sale which it obtained.

[3] Before us the only point taken was that there was no loan from the plaintiff to the defendant and therefore the charge was not enforceable. Accordingly, the defendant had shown cause to

A the contrary. In our judgment the answer to the defendant's submission is to be found in s. 242(1) of the Code which says this:

> Every charge to secure the repayment of a debt, or the payment
B **of any sum other than a debt,** (in either case, whether the amount in question is to be paid as a lump sum or by instalments) shall be effected by an instrument in Form 16A. (emphasis added.)

The section recognises that a charge may be secured to repay a
C debt or a sum which is not a debt. In short, Parliament has made it possible for registered proprietors of land to create charges to secure payments such as those in the present case. There is accordingly no merit whatsoever in the point taken by the defendant.

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[4] A further submission was made with considerable diffidence that the sum set out in the Form 16 D demand was not due. But this argument was not seriously pursued. What the defendant's complaint really boils down to is this. The plaintiff committed a
E breach of its obligations under the turnkey contract and is therefore not entitled to enforce the charge. This submission fails. For, it is settled law that an application for an order for sale is not an action on the covenant: it is the exercise of a statutory remedy. As Seah SCJ observed in *Malaysian International Merchant*
F *Bankers Bhd v. Dhanoa Sdn Bhd* [1988] 1 CLJ 8; [1988] 1 CLJ (Rep) 193:

> The claim of the appellant in the court below was in exercise of their statutory remedy against the respondent as chargor in default under the provisions of the National Land Code 1965.

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> The appellant's claim was not under a covenant but under the registered charge.

[5] In *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 the Federal Court limited the categories which constitute cause to
H the contrary under s. 256 of the Code. They are (i) where the chargor is able to successfully impeach the chargee's title to the charge on any of the grounds provided in s. 340 of the Code; (ii) where there is a failure on the part of the chargee to meet the conditions precedent for the making of an application for an order

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for sale; (iii) where to grant an order for sale would contravene some rule of law or equity. The instant defendant has plainly failed to bring the facts of his case within any of these categories. Accordingly no cause to the contrary was established before the High Court.

[6] In the light of the foregoing the appeal was dismissed without the necessity for calling upon counsel for the respondent. The orders usually consequent upon a dismissal were made.